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NO. 1116

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

JAMES C. KIRKPATRICK, Secretary of State of Missouri, and NORMAN H. ANDERSON, Attorney General of Missouri,

Appellants,

vs.

PAUL W. PREISLER, LOUISE ERBE, BOSTIC J. FRANKLIN, LUCILE RIEDEL, DOROTHY CHILDS, SARAH RIFKIN, and MARTHA LEONARD,

Appellees.

On Appeal from the United States District Court For the Western District of Missouri Central Division.

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO AFFIRM.

PRELIMINARY STATEMENT.

The motion to affirm filed by Appellees adopted Appellant's statement of the case with certain exceptions. These exceptions are unfounded and Appellants' statement of the case should stand as presented.

Appellees object to that part of the statement of the case which summarizes the testimony of certain leaders of the

Missouri Legislature, viz., the Chairman of the Senate Committee on Reapportionment and the Majority and Minority leaders of both houses. The testimony of these legislative leaders reflected their intimate knowledge of the consideration of congressional redistricting by the legislature. These leaders were in a position to know, and did know, the considerations which were taken into account by the legislature in considering this problem. Their testimony was uncontroverted. Appellants notified Appellees several days in advance of the hearing that these witnesses would testify and therefore, Appellees had ample time to call as many witnesses as they might care to. Appellees did in fact subpoena five members of the legislature who appeared in court but were not called as witnesses.

Appellees also object to the inclusion in the statement of the case of the table reflecting the supposed populations of the districts in the 1967 Missouri Congressional Districting Act which were before the legislature upon final enactment of the Law. After this litigation commenced it was discovered that these district populations were inaccurately calculated. Appellants do not understand the nature of Appellee's objection to the inclusion of this table. The table was included in the majority opinion of the court below and is found on Page 6 of Appendices to Jurisdictional Statement. The table is a part of the evidence in the record and an understanding of this case is incomplete without its inclusion.

Appellees also object to Appellants setting forth the variations from ideal of the populations of the districts expressed in percentage terms. The cases on reapportionment in which the courts have stated such variations in percentage terms are legion. In **Bush v. Martin** S.D.Texas (1966) 251 F.Supp. 484, l.c. 511, the court commented upon the expression of population differences in percentage terms as follows:

"But despite these expressions, the fact remains that

the goal of numerical equality deals with numbers and in the final analysis the end result is tested in numbers —e.g., this much deviation is too much, or this much deviation is permissible under these circumstances. And numbers means a comparison by percentage or ratio with the Ideal. Consequently, while we might be forbidden to lapse into arithmetical language in expressing approval or rejection, we certainly think that in testing whether a good faith effort was made by the Legislature, it is proper both to assay the mathematical standard set by the Legislature as its guide and to indicate for future action the outside maximum permissible deviation."

The issue in congressional redistricting cases is whether or not the vote of Mr. "X" has been diluted in a fashion that is repugnant to the fundamental principles of representative government. Furthermore, use of percentages is necessary to place the situation in a given state in true perspective. For example, 10,000 people in New York State, with a total 1960 population of nearly 17,000,000 and 10,000 people in Alaska, with a total population of slightly over 200,000, would hardly be the same for legislative apportionment purposes. Use of raw population data alone would be highly misleading. A determination of whether or not there is significant vote dilution cannot be effectively measured or expressed except in terms of percentage.

Therefore, Appellants' statement of the case in its Jurisdictional Statement stands as a concise statement of the facts material to the consideration of the questions presented by the appeal.*

*Appellants direct attention to a typographical error on page 9 of the Jurisdictional Statement. On line 20 of page 9 the population of Jackson County is stated to be over 60,000. In fact, the population of Jackson County is over 600,000.

ARGUMENT.

1.

The first question presented by Appellants in its Jurisdictional Statement contends that the opinion, decision, and judgment of the lower court erroneously construed **Wesberry v. Sanders** by finding that congressional districts are not as equal in population as practicable if any other plan proposed to the legislature or to the court can result in districts with smaller population variations. In Appellants' statement of the reasons why the questions presented are so substantial as to require plenary consideration Appellants quote from the majority opinion in support of its understanding that the court adopted the principle as stated in the question presented. Appellees claim that Appellants have misrepresented the majority opinion by incompletely quoting from the opinion.

Inasmuch as Appellees imply that the full meaning of the majority opinion is not reflected in Appellants' discussion of this question some explanation may be in order for Appellants use of one clause in a particular sentence from the majority opinion. The full sentence enunciates the following two principles: 1. The United States Supreme Court has rejected the judicial use accorded the phrase de minimis as a principle justifying variation in the populations of congressional districts. 2. If better plans are presented to the legislature or to the court, a congressional redistricting act has not created districts as nearly equal in population as practicable.

Appellants discuss the erroneous rejection of the de minimis principle in another part of its statement of the reasons why the questions are substantial. Appellants raised separately the second erroneous principle in regard to "better plans." There is absolutely no question whatsoever that the majority opinion does find that congressional districts are

not as nearly equal in population as practicable if any plan has been submitted to the legislature or to the court reflecting congressional districts with population variations closer to mathematical equality. An examination of the majority opinion discloses that it is permeated with statements and declarations which can have no other meaning. See, e.g., Appendices to Jurisdictional Statement, Pages 7, 9-10, 13-14, 15, 17, 36, 49-50, 55, 56, 64 and 65.

The principle in question is unequivocally adopted by the lower court following its discussion in support of the proposition that the phrase "as nearly equal as is practicable" is a precise constitutional standard. This discussion commences in Appendices to Jurisdictional Statement, Page 47 and is concluded on Page 59. The discussion is climaxed on Page 59 with the following ringing pronouncement:

> "The standard of 'as nearly as practicable' means today what it meant to Daniel Webster and has meant throughout our history. Within the context of congressional districting, if plans before the legislature or in evidence before a court establish that more equal districting was obtainable than that which was adopted, then obviously the plan enacted, on the facts, does not meet the now constitutional command that the districting be equal 'as nearly as is practicable.' "

Appellees attempt to water down this stringent but erroneous principle by reference to the clarifying comments of Judge Collinson who had concurred in the majority opinion. Appellees incorrectly refer to these comments of Judge Collinson as "his concurring opinion." An examination of the comments reflects that Judge Collinson is attempting some clarification of his concurrence in the majority opinion by reason of the views expressed in Judge Matthes' dissenting opinion. Although Judge Collinson has attempted to clarify his views his concurrence in the majority opinion remains

unaltered. Significantly, this attempted clarification by Judge Collinson concludes by reiterating the views in the majority opinion to the effect that he considers the 1967 act unconstitutional solely because a better plan had been presented to the court.

Certainly the dissenting Judge is in no doubt as to the import of the majority opinion. The views of Judge Matthes in this regard are expressed as follows, Appendices to Jurisdictional Statement; Page 83.

> "In my view the majority effectively but unwarrantedly sounds the death knell to the 'de minimis' doctrine in the field of Congressional redistricting. **If the majority opinion survives and becomes the law, no Congressional redistricting act enacted by the Missouri Legislature can withstand judicial scrutiny so long as that body could conceivably formulate a better plan which would mathematically redistrict the state with greater equality.** In short, the majority rejects the Missouri plan despite the relatively minor variations in populations between districts because it does not approach their standards of perfection. Their position necessarily leads to the conclusion that only the courts can ultimately assume and properly complete the task of Congressional redistricting—a function primarily committed to the state legislatures. Even the courts, however, would be beset with difficulties in formulating court plans to comply with the unduly strict and unrealistic standards enunciated by the majority." (Emphasis Added)

And Pages 92 and 93 as follows:

> "The underlying rationale of the majority is very disturbing to me. Careful analysis of their opinion will permit only one conclusion—that if in the judgment of the court, not the legislature, a plan providing for greater

equality in representation can be formulated, the legislative plan must fail. Appendices A and B attest to this conclusion. In those appendices the court has engaged in a game of 'redistricting checkers' by shifting counties and townships from one district to another in order to demonstrate how smaller deviations could have been reached. This reasoning runs counter to my conception of the law."

The substantial nature of this question is dramatically presented in the concluding paragraph of the dissenting opinion as follows, Page 93:

"* * * If every apportionment Act must be cast aside because a reviewing court could devise a scheme for more equal representation, I believe it is high time that the Supreme Court, in no uncertain language, promulgates such a standard * * *."

2.

The second question presented in the Jurisdictional Statement contends that the opinion, decision, and judgment of the lower court is in conflict with numerous decisions of this court in that the court rejected the principle that population variations in congressional districts which are de minimis are constitutionally permissible. The lower court further finds that minor variations in population of congressional districts are unconstitutional in the absence of competent and substantial evidence justifying the variations.

Appellees claim that the statement of this question is "* * * an erroneous statement of the court's interpretation of the cases and of the term 'de minimis'." (Motion to Affirm, page 7) Appellants utterly fail to support this claim.

The validity of the question is demonstrated beyond doubt by the majority opinion in the Appendices to Jurisdictional Statement. After reviewing the effect of de minimis

population variations in appropriate cases, the court relegated the de minimis principle to the bone yard with the following declaration (page 12):

> "'* * * De minimis,' we suggest, belongs where Mr. Justice Clark put it in his concurring opinion in Baker v. Carr; among discarded generalities such as 'classic legislative judgment' and 'no significant discrepancy'."

As noted above in the discussion under 1, the opening remarks of the dissenting opinion recognize without question that the majority has sounded the "* * * death knell to the 'de minimis' doctrine in the field of Congressional redistricting * * *." (page 83)

Appellants respectfully submit that this burial of the de minimis doctrine in congressional redistricting deserves, at the very least, the full graveside rites of this court.

3.

Appellees' Motion to Affirm, pages 7 through 9 is principally devoted to paraphrasing questions 3, 4, 5, 6 and 7 of the Questions Presented by Appellants. Appellees dismiss these questions presented as being unsubstantial without even the pretense of thorough discussion. However, Appellants may be somewhat remiss if some comment is not made concerning Appellees' treatment of these questions.

The fifth question presented by Appellants in their Jurisdictional Statement was that the District Court erroneously adopted a principle which limits the legislature to a consideration of population alone in congressional districting and totally excludes any other considerations whatsoever. On Page 8 of the Motion to Affirm, Appellees apparently part company with this rigorous standard of the court below when they concede that at no time during the entire proceedings did they "question the authority of the legislature to consider any factors they may deem desirable in making

districts. Appellees are only interested in the population conforming to constitutional standards." In a like vein, the Appellees earlier conceded the following:

> "Alternative proposed plans, **because of the Legislature's inherent discretion of selection,** could not be the basis of invalidation of an otherwise valid act." (Motion to Affirm, page 5; Emphasis Supplied).

This, rather than attacking the Appellants' contention that the lower court has eliminated any considerations other than population from the legislature's congressional districting effort, it would seem that the Appellees have joined the Appellants in recognizing the relevance and propriety of considerations other than population.

The sixth question presented by Appellants in their Jurisdictional Statement was that certain inaccuracies existed in the Findings of Fact of the lower court, and that such inaccuracies could have influenced the court's conclusion. The Appellees merely note the Appellants' contention as to such inaccuracies without the slightest refutation of the merits of the contention (Motion to Affirm, page 9). Instead, the Appellees merely comment upon the failure of the Appellants to bring such inaccuracies to the attention of the district court in the form of a motion for rehearing. Appellees cite no authority in support of this proposition. Appellants are not required to bring such inaccuracies to the court's attention by motion prior to pursuing an appeal. Furthermore, the lower court's memorandum and order granting a motion to stay pending disposition of the appeal makes it quite clear that the court considered time to be of the essence in this appeal (Appendices to Jurisdictional Statement, pages 102 and 103). The Appellants have so acted in the docketing of this appeal.

The seventh question presented in the Jurisdictional Statement was that the lower court erroneously found the

1967 Missouri Congressional Districting Act invalid under Article I, Section 2, of the United States Constitution, for the reason that the variation in population of the districts therein were minor. In their Motion to Affirm the Appellants contend that this question is unsubstantial because the maximum variation between districts of 25,802 in the 1967 Missouri Act could have been further reduced and accordingly was not "minor" (Motion to Affirm, page 9). Appellants contend that in a state of nearly 4½ million population, divided among ten congressional districts, a maximum variation of 25,000 persons is a minor variation.

Reason dictates that a de minimis standard or a judicial tolerance of minor variations, must apply to congressional reapportionment for the reason that the subject matter, namely population, is never capable of precise measurement. The subject matter is always in a state of change. Of necessity, we are dealing with approximate measures and numbers in motion. Population, like a river, continually flows. It is sometimes high, sometimes low, but always changing. A perfect apportionment would be to accurately measure the population on election day and divide the state into absolutely equal districts on that date. Such a perfect apportionment is, of course, impossible of practical attainment. Any apportionment short of the perfect apportionment will have mathematical differences.

It is recognized that apportionment need not be done more frequently than decennially. Within a period of ten years, there will be considerable change in the population and the apportionment will in all likelihood have considerable mathematical inequalities at the end of the period. Apportioning without recognition of the fact that population continually changes is like buying shoes for a growing boy that fit like a glove. They would be outgrown immediately, and certainly we cannot expect them to be worn for

ten years. In this particular case, it is eight years since the state's foot was last measured. It is self-evident that the 1960 measurement is no longer accurate.

To require perfect apportionment at the beginning of the decennium is unrealistic. To require such eight years later is doubly so. The lower court's rejection of the 1967 Missouri Act because of a maximum population variation of 25,000, or 6 per cent, is a virtual quest for perfect apportionment in a world that does not exist.

Appellants in their Jurisdictional Statement have directed the court's attention to **Connor v. Johnson**, Civil No. 3830, S.D.Miss., September 28, 1966, aff'd 386 U.S. 483 (1967), as authority in support of the constitutionality of the 1967 Missouri Act. Appellees have disputed the weight of this authority. Appellants' thorough discussion of this case and its application to the 1967 Missouri Act as set forth in the Jurisdictional Statement needs no further elaboration. Any further discussion would descend into a "yes it is, no it isn't" type argument. Appellants reiterate their reliance upon the cited case as authority in determination of the case at bar.

Appellants have also cited **Gong v. Kirk**, S.D.Fla., Civil No. 64-143-CIV-EC, aff'd sub nom. **Kirk v. Gong**, Docket No. 872, January 15, 1968, in support of the de minimis variations in populations between the districts in the case at bar. The Florida congressional districts had been established by the lower court and it was discovered that the populations of the districts as calculated by the lower court were substantially inaccurate. Actual population figures calculated by the Bureau of Census reflected that the districts varied in population by 11.83% between the smallest and the largest district. It is significant that Appellees have not controverted the authority of **Gong v. Kirk** in their Motion to Affirm. It is interesting to note that the

inaccurate calculations of population by the Florida court in drawing congressional districts was much worse than the inaccurate population calculations by the 1967 Missouri Legislature. Furthermore, actual population variations according to accurate calculations between the most populated and the least populated Florida districts are far in excess of those reflected in the Missouri districts.

CONCLUSION.

It has been almost four years since this court rendered its landmark decision in **Wesberry v. Sanders** in regard to the constitutional requirements for population equality in congressional districts. Litigation from the lower courts applying the principles of **Wesberry v. Sanders** have reached this court several times during the past four years. The facts and circumstances in these various cases have been such that this court has been able to dispose of the various cases summarily by affirmance or reversal. Out of the many cases in the several states, no lower court, federal or state, has found a congressional redistricting act to be in non-compliance with the population requirements of the Constitution with population variations between districts as minimal as those contained in the Missouri Act. In fact, Appellants have found no decision of a lower court invalidating a congressional redistricting act with population variations double those found in the Missouri Act, either in terms of numbers or in percentage terms.

Appellants have demonstrated in their Jurisdictional Statement and in this brief that the lower court has departed from the principles enunciated by this court and has adopted principles far more stringent than those required by this court or followed by any other lower courts. In effect, wholly new standards have been followed in drawing congressional districts. Instead of applying the law as construed by this court, the lower court has declared entire new principles of law. New principles becoming the law of the land deserve the plenary consideration of this court and should not become firmly embedded into our jurisprudence without the full rationale of and promulgation by this court.

Appellants are firmly convinced by logic and by facts pursuant to the existing principles applicable to congressional redistricting that the 1967 Missouri Act meets the

population requirements of the Constitution. The court's attention is directed to the scholarly and realistic dissenting opinion of the Honorable M. C. Matthes, Judge of the Court Appeals for the Eighth Circuit. The dissent is set forth in Appendices to Jurisdictional Statement, pages 83-95. Appellants consider the dissent to be a lucid and concise statement of the law applicable to this case. Therefore, a reversal of the lower court should follow.

However, if this court agrees with the judgment of the lower court, the far reaching consequences of the new principles announced in the lower court's opinion should not become the law of the land without plenary consideration by this court. The whole question of congressional redistricting has become reduced to such fine mathematical distinctions that the promulgation of further guidelines by this court in the implementation of its opinion in **Wesberry v. Sanders** is required. Legislative bodies which have the responsibility of creating congressional districts are entitled to no less.

It is respectfully submitted that Appellees Motion to Affirm should be denied and the court should enter its order either reversing the judgment of the lower court or noting probable jurisdiction and docketing this case for argument.

Respectfully submitted,

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